United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2535

B/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE,

-AGAINST-

SUSAN MOAZEZI,

APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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PRELIMINARY STATEMENT

SUSAN MOAZEZI APPEALS FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FRANKEL, J.) ENTERED ON OCTOBER 22, 1974, AFTER A JURY TRIAL, WHICH JUDGMENT CONVICTED APPELLANT OF CONSPIRACY TO VIOLATE SECTIONS 812, 852(A), 960 (A)(1), 960(B)(1), 960(B)(2), 841(A)(10, 841(B)(1)(A) AND 841(B)(1)(B) OF TITLE 21, UNITED STATES CODE, (COUNT 1); POSSESSION WITH INTENT TO DISTRIBUTE A SCHEDULE II NARCOTIC DRUG CONTROLLED SUBSTANCE (3.74 GRAMS OF COCAINE HYDROCHLORIDE), TITLE 21, UNITED STATES CODE, SECTIONS 812, 841(A)(1) AND 841(B)(1)(A), (COUNT 2); AND POSSESSION WITH INTENT TO DISTRIBUTE A SCHEDULE I CONTROLLED SUBSTANCE (310 GRAMS OF MARIJUANA) TITLE 21, UNITED STATES CODE, SECTIONS 812, 841(1)(1) AND 841(B)(1)(B), (COUNT 4).

THE DEFENDANT WAS ACQUITTED OF COUNT 3 OF THE INDICTMENT, POSSESSION WITH INTENT TO DISTRIBUTE 0.13 GRAMS OF HEROIN.

MRS. MOAZEZI WAS SENTENCED ON COUNT 1 TO THREE MONTHS IMPRISONMENT AND TWO YEARS SPECIAL PAROLE.

IMPOSITION OF SENTENCE AS TO COUNTS 2 AND 4 SUSPENDED.

ON APPEAL, MRS. MOAZEZI ARGUES THAT (1) HER PRE-TRIAL AND TRIAL MOTION FOR RELIEF FROM THE PREJUDICIAL JOINDER OF COUNT ONE WITH COUNTS TWO, THREE, AND FOUR, WAS IMPROPERLY DENIED AND CONSTITUTED AN ABUSE OF DISCRETION, AND, (2) HER PRE-TRIAL MOTION FOR SUPPRESSION OF EVIDENCE WAS IMPROPERLY DENIED.

QUESTIONS PRESENTED

1. WHETHER THE COURT ABUSED ITS DISCRETION IN ITS REFUSAL TO SEVER THE CONSPIRACY COUNT 1, FROM SUBSTANTIVE COUNTS 2, 3, AND 4, IN LIGHT OF ITS INSTRUCTIONS TO THE JURY THAT THE CONSPIRACY WAS NOT IN EXISTENCE AT THE TIME OF THE SUBSTANTIVE OFFENSES BUT THE EVIDENCE OF THE CONSPIRACY COULD BE CONSIDERED IN ITS DELIBERATION OVER THE SUBSTANTIVE COUNTS.

2. WHETHER THE UNCORROBORATED INFORMATION OF A CO-CONSPIRATOR WITHOUT PAST PROVEN RELIABILITY CONSTITUTES PROBABLE CAUSE WHEN THE INFORMER EVENTUALLY GIVES HIS INFORMATION UNDER OATH UNDER CIRCUMSTANCES EVINCING STRONG MOTIVES TO LIE

STATEMENT OF FACTS

(1)

PRIOR TO THE COMMENCEMENT OF THE TRIAL, AN EVIDENTIARY HEARING WAS CONDUCTED BEFORE JUDGE FRANKEL, ON A MOTION TO SUPPRESS PHYSICAL EVIDENCE. AT THE HEARING, THE GOVERNMENT CALLED THREE WITNESSES, ALL SPECIAL AGENTS EMPLOYED BY THE DRUG ENFORCEMENT AGENCY. THE AGENTS WERE FREDERICK S. LOUGH, RICHARD L. MOSER AND PATRICK BRADLEY.

THE AGENTS TESTIFIED THAT ON JANUARY 16, 1974, AT APPROXIMATELY 7:40 P.M., THEY WENT, TOGETHER WITH OTHER AGENTS, TO APARTMENT 7B AT 315 WEST 102ND STREET, NEW YORK COUNTY, IN ORDER TO EXECUTE TWO ARREST WARRANTS ISSUED FOR THE APPELLANT, SUSAN MOAZEZI AND HER HUSBAND AKBAR MOAZEZI (LOUGH: M1, 3; MOSER: M65-6; BRADLEY: M94-5).* WHEN THEY ARRIVED AT THE APARTMENT DOOR, AGENT MOSER KNOCKED (LOUGH: M4; MOSER: M66; BRADLEY M95).

AGENT MOSER TESTIFIED THAT AFTER HE KNOCKED ON THE DOOR, IT OPENED, AND AS HE STARTED TO ENTER HE "WENT TO IDENTIFY... [HIMSELF] WITH HIS SHIELD", SAYING "FEDERAL AGENTS". THEN, TWO PEOPLE TRIED TO PUSH HIM OUT, AND THE OTHER AGENTS PUSHED THEMSELVES INTO THE APARTMENT (MOSER: M66-7, M72-5).

AGENT LOUGH WENT FROM THE FOYER DIRECTLY INTO THE LIVING ROOM AND THEN INTO THE BACK ROOM WHERE HE PLACED APPELLANT SUSAN MOAZEZI UNDER ARREST (M36-7). AGENT LOUGH TESTIFIED THAT THE

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* NUMBERS PRECEDED BY THE LETTER "M" REFER TO PAGE NUMBERS OF THE MOTION TO SUPPRESS. NUMBERS PRECEDED BY THE LETTER "A" REFER TO PAGE NUMBERS IN THE APPENDIX. ALL OTHER NUMBERS REFER TO PAGES IN THE TRIAL TRANSCRIPT.

LIVING ROOM IS A SEPARATE DISTINCT ROOM TO THE RIGHT (M34).

THE AGENT RETURNED WITH APPELLANT THROUGH THE LIVING ROOM AND THEN INTO THE FRONT ROOM OF THE HOUSE WHERE DEFENDANT AKBAR MOAZEZI AND JACQUES CHARLES, A FRIEND OF THE MOAZEZIS, WERE UP AGAINST THE WALL AND BEING SEARCHED (M5, 37). WHILE IN THE FRONT ROOM, HE OBSERVED VARIOUS PLASTIC BAGS CONTAINING MARIJUANA ON THE MIDDLE OF AN ARTIST TABLE, HALF WAY INTO THE FRONT ROOM FROM THE ENTRANCEWAY OF THE APARTMENT. HE ALSO OBSERVED ON THE TABLE A WHITE FILMY POWDER THAT HE THOUGHT TO BE COCAINE (M5, 8, 11, 38, 563).

THE MOAZEZIS AND CHARLES WERE IN THE FRONT ROOM WHEN AGENT LOUGH OBSERVED AGENT BRADLEY SEIZE A GLASS JAR CONTAINING FIVE BAGS OF MARIJUANA FROM A SHELF ABOVE THE ARTISTS TABLE (M11, 12, 13). BRADLEY TESTIFIED THAT HE OBSERVED THE GLASS JAR AFTER HE WALKED THROUGH THE MAIN ROOM, THE LIVING ROOM, THE KITCHEN, AND ANOTHER BEDROOM (M95). AFTER HE OBSERVED ALL ROOMS WERE SECURE, AND THAT NOBODY ELSE WAS IN THE APARTMENT EXCEPT THOSE IN CUSTODY, HE ENTERED THE MAIN ROOM (M95-6, 98-9). ON ENTERING THE MAIN ROOM, HE FIRST OBSERVED THE THREE DEFENDANTS AND THE AGENTS. HE THEN WALKED OVER TO THE ARTIST TABLE AND OBSERVED AND SEIZED THE GLASS JAR (M99). SIX TO EIGHT AGENTS PARTICIPATED IN THE ARREST (M31, 33).

JACQUES CHARLES TESTIFIED THAT PRIOR TO THE ENTRY OF THE AGENTS, HE HAD BEEN IN THE APARTMENT A FEW HOURS (M107-8, 112). DURING THAT TIME, HE WAS MAINLY IN THE FRONT ROOM AND HAD OBSERVED NO MARIJUANA LYING AROUND (M107-8).

HE TESTIFIED THAT HE RESPONDED TO A KNOCK AT THE DOOR, OPENED IT A LITTLE, ASKED WHO IT WAS AND WAS TOLD IMMIGRATION AND

WAS SIMULTANEOUSLY DISPLAYED A CLOSED WALLET WITH A GUN UNDER THE WALLET (M106). AGENT MOSER HAD TESTIFIED THAT HE DIDN'T SAY "IMMIGRATION" ALTHOUGH HE HAD PLANNED TO (M71). CHARLES TRIED TO CLOSE THE DOOR BUT THE AGENTS PUSHED THROUGH THE DOOR (M106). AGENTS PUSHED HIM INTO THE OPENING OF THE FRONT ROOM AND LOOKED AROUND (M106). HE WAS THEN TAKEN INTO THE CHILD'S BEDROOM WHERE HE WAS QUESTIONED. HE TESTIFIED THAT HE HEARDNOISE, DRAWERS BEING OPENED AND CLOSED AND ESPECIALLY THE LARGE TABLE DRAWER BEING OPENED IN THE FRONT ROOM (M107).

LOUGH TESTIFIED THAT THE ARREST WARRANT WAS OBTAINED ON JANUARY 10, 1974, AND EXECUTED ON JANUARY 16, 1974 (M29). BETWEEN THOSE TWO DATES, THE APARTMENT WAS UNDER SURVEILLANCE ON SEVERAL DIFFERENT OCCASIONS (M29-30).

AFTER THESE ALLEGED PLAIN VIEW SEIZURES, SOME OF THE AGENTS LEFT THE APARTMENT AND SECURED A SEARCH WARRANT, RETUREND LATER AND CONDUCTED A SEARCH FINDING AT LEAST "6 OTHER NARCOTICS EXHIBITS", A PISTOL, NOTEBOOKS, AND SOME OTHER ARTICLES (LOUGH: M18-24; MOSER: M80-2).

THERE WAS OTHER TESTIMONY BY THE AGENTS TO THE EFFECT THAT THE DEFENDANTS WERE TAKEN FROM THE APARTMENT, THAT THEY WERE ADVISED OF THEIR CONSTITUTIONAL RIGHTS ON VARIOUS OCCASIONS AND THAT EACH MADE CERTAIN STATEMENTS.

AFTER THE HEARING, THE DEFENDANTS' MOTION TO SUPPRESS THE EVIDENCE WAS DENIED.

THE GOVERNMENT'S FIRST WITNESS IN THE TRIAL WAS JEREMIAH SCANLON, A CITIZEN OF IRELAND, WHO TESTIFIED THAT HE CAME TO THE UNITED STATES IN THE SUMMER OF 1972 TO COLLECT A $5,000.00 INHERITANCE (50-2, 180); THAT DURING THAT SUMMER HE FLEW TO JAMAICA, RETURNING TO NEW YORK IN SEPTEMBER, 1972, WITH 189 POUNDS OF MARIJUANA PURCHASED IN JAMAICA (52, 187, 192). ON THE PLANE TO NEW YORK, HE MET BARBARA OLSEN (53). ON OCTOBER 20, 1972, SCANLON WENT TO OLSEN'S APARTMENT WITH 7 POUNDS OF MARIJUANA AND THERE MET DEFENDANTS SUSAN AND AKBAR MOAZEZI (56, 59, 190). HAVING KNOWN THE DEFENDANTS FOR ABOUT AN HOUR, OLSEN, SCANLON AND THE MOAZEZIS LEFT OLSEN'S APARTMENT AND WENT TO THE MOAZEZIS' APARTMENT AT 315 WEST 102ND STREET WHERE SCANLON SOLD THE 7 POUNDS OF MARIJUANA TO THE DEFENDANTS (57, 195, 196).

ON OCTOBER 20TH, SCANLON SOLD 5 POUNDS OF MARIJUANA TO THE MOAZEZIS AT THEIR APARTMENT (59-60).

HE RETURNED TO IRELAND AND ON DECEMBER 1, 1972, FLEW TO BOGOTA, WHERE HE PURCHASED 1 1/2 OUNCES OF COCAINE (64). PRIOR TO MAKING ANY STATEMENTS AGAINST THE MOAZEZIS, SCANLON WAS TOLD HE WOULD NOT BE PROSECUTED FOR THIS IMPORTATION, IF HE COOPERATED (340).

ON DECEMBER 8TH OR 9TH, HE RETURNED TO NEW YORK, SAW THE

MOAZEZIS AND SOLD THEM ABOUT 3/4 OUNCE OF COCAINE (85-6). BETWEEN DECEMBER 9TH AND DECEMBER 13TH, HE HAD HAD THREE TO FOUR CONVERSATIONS WITH THE DEFENDANTS CONCERNING IMPORTING COCAINE INTO THE UNITED STATES (86-93). THE DEFENDANTS HAD TOLD SCANLON THAT THEY HAD FRIENDS GOING BACK AND FORTH FROM SOUTH AMERICA AND INVITED HIM TO JOIN THEM (91). APPELLANT TOLD HEM THAT HE COULD EARN $60,000.00 (91-2). DURING ONE OF HIS VISITS TO THE MOAZEZIS' APARTMENT, DEFENDANT HIGNITE WAS THERE AND TOLD HIM TO TEST FOR COCAINE BY DROPPING IT INTO A TYPE OF ALCOHOL AND IT WOULD CHANGE COLOR (93, 95). THE GOVERNMENT DRUG EXPERT MANNING TESTIFIED THAT IF COCAINE WAS DROPPED IN ALCOHOL IT WOULD DISSOLVE, NOT CHANGE COLOR (264-5). THE APPELLANT GAVE HIM $4,000.00 IN CASH TO GO TO BOGOTA TO BUY 600 GRAMS OF COCAINE (94-5, 250). ON DECEMBER 14TH, HE FLEW TO BOGOTA (95-6, 246). IN BOGOTA HE PHONED AN "AUGUSTO", BUT SPOKE TO AN AMERICAN, JOHN PAUL (243, 246-7). AUGUSTO'S TELEPHONE NUMBER HAD BEEN GIVEN TO SCANLON BY THE APPELLANT (97-8). JOHN PAUL MET SCANLON AT SCANLON'S HOTEL AND TOOK HIM TO AUGUSTO'S APARTMENT AND THEREGAVE AUGUSTO THE $4,000.00 (98-9, 247). THE COCAINE WAS TAPED TO HIS BODY BY AUGUSTO AND PAUL (100).

SCANLON THEN FLEW TO NEW YORK, ARRIVING ON DECEMBER 18TH WITH 600 GRAMS OF COCAINE (100-1). ON ARRIVAL, HE CALLED SUSAN AND AKBAR MOAZEZI.

ON THE FOLLOWING DAY, DECEMBER 19TH, HE BROUGHT THE COCAINE TO THE MOAZEZIS' APARTMENT AND WAS GIVEN $1,000.00 BY APPELLANT SUSAN MOAZEZI (101, 103). ON DECEMBER 23RD HE RECEIVED $7,000.00 TO GIVE TO AUGUSTO IN BOGOTA AND ON DECEMBER 25TH HE RECEIVED

$3,500.00 FOR HIMSELF FROM THE APPELLANT (105). THE MOAZEZIS ALSO TOLD SCANLON TO TELL AUGUSTO THAT $8,000.00 WOULD BE WIRED TO HIM AT THE FIRST NATIONAL CITY BANK IN BOGOTA.

THIS $15,000.00 WAS TO PURCHASE FROM AUGUSTO TWO KILOS OF COCAINE TO BE FLOWN BACK TO NEW YORK BY PRIVATE PLANE (106-7).

ON JANUARY 2, 1973, HE FLEW TO BOGOTA, SAW PAUL AND AUGUSTO, GAVE AUGUSTO THE MONEY AND THE MOAZEZIS' MESSAGE (110). ON JANUARY 23RD, HE WENT TO THE MOAZEZIS' APARTMENT AND THE MOAZEZIS ASKED HIM TO GO BACK TO BOGOTA TO MAKE ARRANGEMENTS WITH AUGUSTO TO BRING A LARGER SHIPMENT OF MARIJUANA AND COCAINE INTO THE COUNTRY. HE WAS GIVEN $4,000.00 BY THE APPELLANT (118-9).

ON JANUARY 24, 1973, HE FLEW TO BOGOTA. HIS AIRLINE TICKET WAS INTRODUCED INTO EVIDENCE (120). IN BOGOTA HE MET AUGUST AND PAUL. TWO MAPS WERE DRAWN UP BY PAUL CONCERNING THE ROUTE BY WHICH THE DRUGS WERE TO BE BROUGHT INTO THE UNITED STATES (124-5). ONE OF THE MAPS SCANLON GAVE TO THE MOAZEZIS. THE OTHER MAP HE RETAINED AND IT BECAME EXHIBIT 37 (128).

FROM BOGOTA, SCANLON WENT TO CARACAS AND THEN TRINIDAD, WHERE HE MET PAUL AND RECEIVED 690 GRAMS OF COCAINE FROM PAUL (128, 199).

HE RETURNED TO NEW YORK ON MARCH 20TH WITH THE COCAINE, AND SOON BROUGHT THE 690 GRAMS TO THE MOAZEZIS' APARTMENT (129-31, 134). THE DEFENDANTS WEIGHED THE COCAINE ON A LARGE SCALE AND TESTED IT (131-2). THE COCAINE WAS PUT INTO ZIP-TYPE BAGS ON THE LARGE TABLE IN THE FRONT ROOM (133). SCANLON SUBSEQUENTLY WENT BACK TO BOGOTA ON MAY 2ND. BETWEEN MARCH 20TH AND MAY 2ND,

HE STAYED WITH A FRIEND, JOHN LINITZ, IN LETTLE NECK, NEW YORK (130, 134-5). DURING THIS PERIOD, HE WENT TO THE MOAZEZIS' APARTMENT TEN OR ELEVEN TIMES AND DISCUSSED COCAINE (134-5).

ON MAY 2ND, HE RETURNED TO BOGOTA AND ON MAY 30TH, WAS GIVEN BY AUGUSTO 250 GRAMS OF COCAINE (142-3). ON MAY 30TH HE RETURNED TO NEW YORK AND SOON WENT TO THE MOAZEZIS' APARTMENT WITH ALL 250 GRAMS OF COCAINE (143, 145).

IN THE MOAZEZIS' APARTMENT, THE APPELLANT AND SCANLON WEIGHED THE COCAINE AND PUT IT INTO VARIOUS PLASTIC BAGS (146). HE VISITED THE MOAZEZIS OCCASIONALLY AND THE APPELLANT COMPLAINED OF THE QUALITY OF THE COCAINE AND SAID SHE WAS HAVING TROUBLE SELLING IT (149, 152). DURING THIS PERIOD, HE STAYED FOR THREE OR FOUR DAYS WITH PATRICIA SADOWSKI WHO TOLD HIM SHE HAD A FRIEND WHO WOULD BUY COCAINE FROM HIM (149, 154). ON JUNE 8, 1973, HE MET HER FRIEND AND ANOTHER FRIEND, WHO WAS IN FACT A FEDERAL AGENT, AT P.J. O'HARA'S RESTAURANT AND BAR ON 53RD STREET AND THIRD AVENUE. HE WENT TO THE BAR WITH 2 1/2 OUNCES OF COCAINE THAT HE HAD PICKED UP FROM AKBAR MOAZEZI PRIOR TO GOING TO THE BAR (154, 156). IN THE PROCESS OF TRANSFERRING THE COCAINE TO THE AGENT, SCANLON WAS ARRESTED BY THE POLICE (156).

EARLIER IN THE DAY HE HAD MET WITH THE AGENT AT THE BAR AND WAS ASKED BY THE AGENT IF HE WOULD SELL HIM 8 OUNCES OF COCAINE. IN THE AGENT'S PRESENCE, SCANLON TESTIFIED THAT HE PHONED THE MOAZEZIS FROM P.J. O'HARA'S AND TOLD THE APPELLANT THAT HE HAD A BUYER FOR 250 GRAMS. APPELLANT SAID SHE HAD GIVEN IT TO SOMEONE ELSE AND TO PICK UP THE 2 1/2 OUNCES (154-6). SCANLON MET THE DEFENDANT AKBAR MOAZEZI IN FRONT OF HIS APARTMENT BUILDING

AND WAS HANDED THE 2 1/2 OUNCES WHICH SUBSEQUENTLY WAS SOLD TO THE AGENT (156).

SCANLON PLEAD GUILTY IN FEDERAL COURT TO SALE OF COCAINE ARISING FROM THE SALE AT THE BAR AND WAS SENTENCED TO TWO YEARS IN JAIL AND THREE YEARS SPECIAL PAROLE (166-7).

AFTER HIS ARREST ON JUNE 8, 1973, HE WAS LODGED IN WEST STREET WHERE SCANLON TOLD AN UNDERCOVER OFFICER, ADRIAN WALLACE, THAT HE WOULD PUT HIM IN CONTACT WITH A NARCOTICS CONNECTION IN RETURN FOR BAIL (219). SCANLON HAD TOLD WALLACE THAT HE COULD GET HIM 4 1/2 OUNCES OF COCAINE FROM THE MOAZEZIS BUT ADMITTED HE NEVER SPOKE TO THE MOAZEZIS, DIDN'T KNOW IF THEY HAD COCAINE, AND NEVER DID IN FACT GET THIS COCAINE FROM THEM (227-8).

AFTER HIS RELEASE FROM WEST STREET, HE WAS REARRESTED [illegible] CONSPIRACY AND SALE OF HEROIN CHARGES BY THE STATE FOR WHICH HE IS FACING LIFE IMPRISONMENT, A SENTENCE HE IS TRYING TO AVOID (235). HE IS AWARE OF THE POSSIBILITY OF LIFE PAROLE FOR CO-OPERATING AGAINST THE MOAZEZIS (237). HE KNEW THAT HIS PROMISE OF COOPERATION AGAINST THE MOAZEZIS WAS TAKEN INTO CONSIDERATION BY JUDGE WEINFIELD IN THE FEDERAL CASE (236).

DURING JUNE OR JULY OF 1973, SCANLON CALLED THE MOAZEZIS FOR BAIL AND AN ATTORNEY BUT THEY REFUSED TO SPEAK TO HIM. DURING THAT PERIOD, HE STARTED COOPERATING WITH FEDERAL AUTHORITIES (238-9, 241).

CARYN ZERIKER TESTIFIED THAT PRIOR TO CHRISTMAS, 1972, SHE WAS WITH SCANLON IN A HOTEL AND OBSERVED IN HIS SUITCASE A WHITE SUBSTANCE WHEN HE OPENED IT FOR AN INDIVIDUAL THERE BY

THE NAME OF "BILL" (481, 492). SHE OBSERVED SCANLON MAKING VARIOUS TELEPHONE CALLS AND HE TOLD HER THAT HE WAS CALLING SUSAN (481). THAT NIGHT, SCANLON BORROWED HER CAR AND TOLD HER THAT HE WAS GOING TO SEE SUSAN (481). ALTHOUGH WILLIAM (BILL) REMAINED IN THE MOTEL ROOM AND SPENT THE NIGHT WITH ZERIKER, ZERIKER DID NOT RECALL HIS LAST NAME (482, 497).

THOMAS P. FEKETE, AN AGENT FOR THE DRUG ENFORCEMENT ADMINISTRATION ASSIGNED TO NEW YORK, TESTIFIED THAT ON JANUARY 8, 1973, HE MET SCANLON AT A BAR AT 869 THIRD AVENUE, NEW YORK, NEW YORK, AND THAT SCANLON OFFERED TO SELL HIM 7 OUNCES OF COCAINE AT $750.00 AN OUNCE (409). AFTER THE NEGOTIATION, FEKETE OVERHEARD A TELEPHONE CONVERSATION BETWEEN SCANLON AND SOMEONE HE CALLED SUE (410). AFTER HANGING UP THE PHONE, SCANLON TOLD THE AGENT SUE HAD SOLD 4 OF THE 7 OUNCES TO SOMEONE ELSE (410).

AT APPROXIMATELY 10:10 P.M. THAT NIGHT, FEKETE MET SCANLON AND PATRICIA SADOWSKI AT THE SAME BAR AND IN THE MENS ROOM SCANLON SHOWED FEKETE TWO PLASTIC BAGS CONTAINING A WHITE POWDERY SUBSTANCE (413). SCANLON TOLD HIM HE WAS EXPECTING COCAINE FROM BOLIVIA AND THAT HE HAD BEEN INVOLVED IN SMUGGLING COCAINE FROM SOUTH AMERICA FOR FIVE YEARS (413). SCANLON AND FEKETE WENT OUTSIDE AT 10:30 P.M. AND SCANLON WAS ARRESTED (413).

JOHN LINITZ TESTIFIED THAT SCANLON LIVED AT HIS HOUSE IN LITTLE NECK, NEW YORK, FOR THE MONTH OF APRIL, 1973 (437-8). SEVEN OR EIGHT TIMES, LINITZ DROVE SCANLON TO 315 WEST 102ND STREET, NEW YORK, NEW YORK, TO VISIT A SUSAN. LINITZ WAITED FOR HIM IN THE CAR. IN NO MORE THAN TWENTY MINTUES, SCANLON RETURNED,

SOMETIMES WITH AN OUNCE OR SO OF MARIJUANA (438-9).

ON ONE OCCASION, HE GAVE THE APPELLANT A RIDE TO THE EAST SIDE AND OVERHEARD HER DISCUSS THE PROBLEMS OF A DRUB ORGANIZATION SHE BELONGED TO CALLED THE BANK, BUT LINITZ TESTIFIED THAT HE DOES NOT RECALL THE DRUG DISCUSSED. THE APPELLANT SAT IN THE REAR SEAT FOR THE TWENTY MINUTE DRIVE (441, 474-5, 478).

IN JUNE AND JULY OF 1974, LINITZ UNDERWENT ELECTROCHEMICAL SHOCK TREATMENTS AND DURING THAT PERIOD OF TREATMENTS HE HAD VERY SLIGHT MEMORY OF PRIOR EVENTS, ALTHOUGH HE TESTIFIED THAT HIS MEMORY WAS NORMAL WHEN HE TESTIFIED (444). HE WAS SHOWN ONE PICTURE OF SUSAN MOAZEZI ON SUNDAY BEFORE GIVING HIS TRIAL TESTIMONY AND WAS ASKED IF THE PICTURE CORRESPONDED TO THE DESCRIPTION OF SUSAN MOAZEZI HE HAD REMEMBERED (472-3). HE WENT TO THE MOAZEZIS' APARTMENT ON THAT SUNDAY AS WELL TO GET ACQUAINTED WITH HER ADDRESS (471).

FREDERICK LOUGH'S TESTIMONY OUTLINED THE ARREST OF THE APPELLANT AND THE SEIZURE OF EVIDENCE IN HER APARTMENT ON JANUARY 16TH (SEE P.3-5). AFTER SCANLON'S ARREST IN JUNE, 1973, LOUGH TESTIFIED THAT HE TOLD SCANLON THAT HE WOULD NOT BE PROSECUTED FOR ANY INFORMATION HE GAVE REGARDING THE MOAZEZIS' (655-6). ON JUNE 12TH OR 13TH, 1973, SCANLON INCRIMINATED THE MOAZEZIS, GAVE THEIR ADDRESS AND TELEPHONE NUMBER TO THE AGENT AND AN OFFICIAL FEDERAL INVESTIGATION OF THE MOAZEZIS BEGAN (633-5, 654-5).

THE PLASTIC BAGS SOLD BY SCANLON TO AGENT FEKETE IN JUNE WERE NOT ANALYZED FOR PRINTS (660-1). HE SUBMITTED A SCALE FOUND IN THE APARTMENT, BUT CHEMICAL ANALYSIS FOUND NOTHING ON IT (684). NO CHEMICALS FOR TESTING COCAINE WERE FOUND IN THE

APARTMENT (684).

LOUGH TESTIFIED THAT ACCORDING TO THE LABORATORY REPORTS, TRACES IN A SMALL BOWL CONTAINED COCAINE (681-2). EXHIBITS 15 THROUGH 24 WERE VARIOUS NOTEBOOKS AND RECORDS TAKEN FROM THE MOAZEZIS' APARTMENT (588-90). HE ALSO TESTIFIED AS TO THE DRUG MEANING OF THE TERMS USED IN THE RECORDS (605-6).

MANNING, A FORENSIC CHEMIST FOR THE DRUG ENFORCEMENT ADMINISTRATION, TESTIFIED AS TO THE WEIGHT AND QUALITY OF THE CONTROLLED SUBSTANCES SEIZED IN THE MOAZEZIS' APARTMENT ON JANUARY 16TH: MARIJUANA - 310 GRAMS; HEROIN - 0.13 GRAMS; COCAINE - 3.74 GRAMS (723, 732, 726). HE TESTIFIED THAT HE DID NOT KNOW FROM HIS ANALYSIS IF EXHIBIT 10-1 HAD TRACES OF COCAINE (746-7). A CHEMICAL METHOD DOES EXIST TO DETERMINE WHERE COCAINE WAS GROWN AND PROCESSED BUT THE METHOD WAS NOT USED IN THIS CASE (743-4).

(3)

RUTH FRIEDMAN TESTIFIED FOR THE DEFENSE THAT SHE IS THE MOTHER OF SUSAN MOAZEZI, THE APPELLANT (778); THAT HER LIFE SAVINGS AMOUNTED TO MORE THAN $40,000.00 AND FIFTY AT&T STOCKS (801-2); THAT SHE HAD HELPED TO SUPPORT AKBAR AND SUSAN AFTER THEIR MARRIAGE BY GIVING THEM CASH PRESENTS OF AT LEAST $12,000.00 FROM THE SUMMER OF 1972 UNTIL LATE 1973 (782, 789); THAT SHE MET SCANLON BRIEFLY ON APPROXIMATELY FOUR OCCASIONS WHILE SHE WAS VISITING HER CHILDREN (784-7); AND THAT ON ONE OCCASION IN SPRING, 1973, VERONICA HIGNITE AND JUD SCANLON CAME TO HER DAUGHTER'S APARTMENT SEPARATELY AT ABOUT THE SAME TIME AND WERE INTRODUCED TO EACH OTHER BY SUSAN (786-7, 791).

SUBSEQUENTLY, SHE WAS AT HER DAUGHTER'S HOUSE AND ANSWERED HER TELEPHONE. JUD SCANLON CALLED AND SHE WAS INSTRUCTED BY HER DAUGHTER TO TELL HIM THAT SHE WAS NOT HOME, WHICH MRS. FRIEDMAN DID (787). HE CALLED FOUR OR FIVE TIMES, AND APPELLANT'S MOTHER KEPT TELLING HIM THAT APPELLANT WASN'T HOME (788-9).

BETWEEN THE SUMMER OF 1973 AND JANUARY OF 1974, SHE HAD GIVEN HER DAUGHTER OVER $6,000.00 (690).

BARBARA OLSEN TESTIFIED THAT SHE HAD MET SCANLON IN OCTOBER OF 1972 AT THE JAMAICA AIRPORT IN MONTEGO BAY AND SAT IN THE AIRPLANE TOGETHER DURING THEIR RETURN TO NEW YORK (821).

HE TOLD HER THAT HE WAS OPENING A BOUTIQUE IN NEW YORK WITH THE NAME OF "TAKE SIX" (822). SCANLON HAD DENIED THIS (189). MARIJUANA WAS SMOKED IN OLSEN'S APARTMENT BY SCANLON (877). THIS HAD BEEN DENIED BY SCANLON (199). THE MOAZEZIS AND SCANLON LEFT FOR THE MOAZEZIS' APARTMENT BUT SHE DENIED GOING TO THE MOAZEZIS' APARTMENT WITH THEM (195, 828). SHE DENIED EVER TELLING SCANLON THAT SHE WOULD INTRODUCE HIM TO A FRIEND CONCERNING HIS MARIJUANA (828, 855). IN THE BEGINNING OF 1973, SCANLON CALLED HER AND ASKED HER IF SHE WAS INTERESTED IN ANY KIND OF DRUGS; SHE SAID NO AND THAT SHE DIDN'T KNOW ANYONE THAT WAS (829).

BETWEEN OCTOBER, 1972, AND JANUARY, 1974, SHE HAD VISITED THE MOAZEZIS' APARTMENT APPROXIMATELY EIGHT TIMES AND HAD SEEN ROLLED MARIJUANA CIGARETTES THERE A FEW TIMES BUT NEVER HEROIN OR COCAINE OR PLASTIC BAGS OF MARIJUANA (835-6).

NEAL FRIEDFERTIG, THE APPELLANT'S BROTHER-IN-LAW, AND A PUBLIC SCHOOL TEACHER, TESTIFIED THAT HE MET APPELLANT PRIOR TO APRIL OF 1972 (839) AND HAD MET SCANLON DURING AN EVENING IN

MARCH OF 1973 IN THE MOAZEZIS' APARTMENT (841). HE TESTIFIED THAT SCANLON CAME INTO THE MOAZEZIS' APARTMENT WITH A BROWN ATTACHE CASE WHICH HE OPENED, EXPOSING COCAINE IN EIGHT ZIP LOCK BAGS (841, 847-8). HE TESTIFIED THAT APPELLANT APPEARED NERVOUS AND STATED THAT SHE DID NOT WANT IT IN THE HOUSE AND TO GET HIM (SCANLON) OUT OF THE HOUSE (842). IN TWENTY MINUTES, SCANLON LEFT WITH THE COCAINE (844, 849, 867). BEFORE LEAVING, SCANLON HAD SAID THAT HE HAD SMUGGLED THE COCAINE INTO NEW YORK (846).

RICHARD MOSER TESTIFIED THAT AFTER HER ARREST, APPELLANT HAD SAID TO HIM THAT SHE "THOUGHT SHE KNEW WHO WAS RESPONSIBLE, OR THE INDIVIDUAL WE GOT THE INFORMATION FROM, AND THAT THIS INDIVIDUAL HAD BROUGHT STUFF OVER TO HER APARTMENT, BUT THAT SHE NEVER GAVE HIM MONEY OR ANYTHING." (871). HE TESTIFIED THAT HE RECALLED STATING BEFORE JUDGE FRANKEL ON A PRIOR OCCASION THAT SUSAN MOAZEZI SAID "I THINK I KNOW WHO IS RESPONSIBLE FOR THIS. HE CAME TO OUR APARTMENT AND HE HAD BROUGHT STUFF BUT WE NEVER TOOK ANYTHING" (872).

JAHAN GOLCHIN TESTIFIED THAT IN DECEMBER OF 1972, HE WAS IN THE MOAZEZIS' APARTMENT AND SCANLON STARTED TALKING ABOUT WHAT HE HAD BROUGHT WITH HIM AND HIS GOOD THINGS. SUSAN MOAZEZI GOT FURIOUS AND AKBAR GOT FURIOUS, YELLING AT BOTH OF THEM (881, 883, 891).

LAURIE BLOOMFIELD TESTIFIED THAT SHE LIVES IN THE MOAZEZIS' BUILDING AND MET SCANLON IN THE MOAZEZIS' APARTMENT IN THE END OF FEBRUARY, 1973, DURING A TWENTY MINUTE VISIT. THERE WAS NO DISCUSSION REGARDING DRUGS AT THAT TIME (928-9).

IN MARCH OF 1973, SHE OBSERVED SCANLON COME INTO THE MOAZEZIS' APARTMENT HOLDING UP A BAG OF WHITE POWDER HE SAID WAS COCAINE. SUSAN MOAZEZI TOLD HIM THAT HE WAS CRAZY AND THAT SHE DIDN'T WANT THAT STUFF IN THE HOUSE AND TOLD HIM TO GET IT OUT OF THE HOUSE (930). AFTER APRIL OF 1972, SCANLON RANG THE DOORBELL AND APPELLANT TOLD HER HUSBAND AKBAR NOT TO LET HIM IN. AKBAR CAME BACK WITHOUT SCANLON (960). SHE STATED THAT IN 1972, SHE, ALONG WITH SUSAN MOAZEZI AND OTHERS, WOULD POOL THEIR MONIES TO BUY MARIJUANA FOR THEMSELVES. THE GROUP WAS CALLED A BANK (940-1, 956). SUSAN MOAZEZI HAD TOLD HER ABOUT IT IN JANUARY OF 1972 AND IT WAS SUSAN MOAZEZI WHO USUALLY COLLECTED THE MONEY AND DISTRIBUTED IT TO THE OTHERS FOR THEM (941, 949-61, 962). THE FIRST TIME SHE BOUGHT MARIJUANA FROM THE BANK SHE GAVE $100.00 TO SUSAN MOAZEZI AND AT THE SAME TIME BLOOMFIELD RECEIVED MARIJUANA.

WENDY BROTHERS TESTIFIED THAT SHE SUBLETTED AN APARTMENT IN THE MOAZEZIS' BUILDING FOR THE SUMMER OF 1973. IN AUGUST, SCANLON CALLED HER ON SEVERAL OCCASIONS STATING THAT HE WAS IN JAIL AND ASKING SUSAN MOAZEZI FOR MONEY. DURING HIS LAST CALL, HE SAID "YOU BETTER TELL SUSAN THAT SHE BETTER GET ME SOME MONEY, OR ELSE SHE IS REALLY GOING TO BE SORRY" (985-6).

POINT I

APPELLANT'S MOTION FOR RELIEF FROM PREJUDICIAL JOINDER WAS IMPROPERLY DENIED

ON APRIL 15, 1974, APPELLANT MOAZEZI MOVED PURSUANT TO RULE 14 FOR SEVERANCE OF COUNTS 2, 3, AND 4, THE SUBSTANTIVE COUNTS OF THE INDICTMENT FROM COUNT 1, THE CONSPIRACY COUNT (A-11)*. ON MAY 7, 1974, THIS PRE-TRIAL MOTION WAS DENIED SUBJECT TO RENEWAL AT TRIAL (A-14). PRIOR TO AND DURING THE TRIAL, THE MOTION FOR RELIEF FROM THE PREJUDICIAL JOINDER WAS RAISED WITH THE COURT'S FINAL DENIAL IMMEDIATELY PRIOR TO THE INTRODUCTION OF THE EVIDENCE OF THE SUBSTANTIVE COUNTS (MOTION TO SUPPRESS: 162-8; TRIAL: 1-8, 533-45; A-19-88).

THE DEFENDANT ARGUED THAT THE GOVERNMENT'S EVIDENCE WOULD SHOW THAT THE CONSPIRACY ALLEGED IN COUNT I AS BEGINNING IN OCTOBER, 1972, CONTINUED NO LONGER THAN JUNE, 1973, AND THAT THE CONTRABAND SEIZED IN JANUARY, 1974 AND UNDERLYING THE SUBSTANTIVE COUNTS WAS TOO MINUTE IN QUANTITY AND THEIR DISCOVERY TOO REMOTE IN TIME TO, IN THEMSELVES, BE PROBATIVE OF THE CONTINUED EXISTENCE OF THE CONSPIRACY, AND EVEN IF PROBATIVE AT ALL, NOT OF SUCH PROBATIVE VALUE AS TO OUTWEIGH THEIR PREJUDICIAL EFFECT ON THE CONSPIRACY COUNT AND VICE VERSA (A-59-88).

WHEN THE SEVERANCE MOTION WAS RAISED PRIOR TO TRIAL ON JULY 29TH, THE GOVERNMENT STATED THAT EVIDENCE SHOWING AN ONGOING

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* THE INITIAL INDICTMENT, 74 CR 87, FILED JANUARY 25, 1974, INCLUDED ONLY THE CONSPIRACY COUNT (A-9). THE APPELLANT WAS TRIED ON SUPERCEDING INDICTMENT 74 CR 225 WHICH ADDED THE SUBSTANTIVE COUNTS (A-10).

CONSPIRACY WOULD BE PRODUCED (M167; 1-65, 66). THE COURT DENIED THE MOTION SUBJECT TO REVIEWING THE TRIAL EVIDENCE TO BE PRODUCED (M168; A-66).

ON AUGUST 19TH, THE MOTION WAS RENEWED. THE COURT THEN ASKED THE GOVERNMENT WHETHER IT WOULD INTRODUCE SOME INDEPENDENT EVIDENCE SHOWING THAT THE COUNT I CONSPIRACY WAS STILL IN EXISTENCE ON JANUARY 16TH, 1974, WHEN THE DEFENDANTS WERE ARRESTED AND THE CONTRABAND UNDERLYING THE SUBSTANTIVE COUNTS WAS SEIZED. THE GOVERNMENT SAID THERE WOULD BE SUCH EVIDENCE AND THE MOTION WAS DENIED (7; A-73).

THE COURT WAS THUS APPARENTLY ASSUMING AS WAS DEFENSE COUNSEL THAT WITHOUT INDEPENDENT EVIDENCE, THE POSSESSION OF 3.74 GRAMS OF COCAINE, 0.13 GRAMS OF HEROIN AND 310 GRAMS OF MARIJUANA IN JANUARY, 1974, WAS NOT IN ITSELF, PROBATIVE OF THE CONTINUATION IN JANUARY, 1974, OF THE ALLEGED 1972 CONSPIRACY TO IMPORT AND DEAL IN KILOS OF COCAINE AND/OR POUNDS OF MARIJUANA AS TO OUTWEIGH THE PREJUDICIAL EFFECT OF ITS INTRODUCTION.

THE TRIAL REFLECTS NO EVIDENCE AT ALL CONCERNING A CONSPIRACY INVOLVING HEROIN, AND THERE WAS NO EVIDENCE SHOWING THAT THE ALLEGED CONSPIRACY INVOLVING THE MARIJUANA OR COCAINE EXTENDED BEYOND APRIL, 1973 IN THE CASE OF THE MARIJUANA (438-9) AND JUNE, 1973, IN THE CASE OF THE COCAINE (154-5). AND THE TESTIMONY OF JEREMIAH SCANLON, THE GOVERNMENT'S CHIEF WITNESS, AS TO THE CONSPIRACY'S CONTINUED EXISTENCE EVEN IN THESE MONTHS WAS UNDER DIRECT TESTIMONIAL ATTACK (FRIEDFERTIG, 842; BLOOMFIELD, 930). IN FACT, THE COURT, IN ITS INSTRUCTIONS TO THE JURY STATED THAT

THE CONSPIRACY WAS NOT IN EXISTENCE IN 1974 (1098, A-31). BUT THE CONTRABAND SEIZED ON JANUARY 16, 1974, WAS NONETHELESS INTRODUCED.

THE PREJUDICIAL EFFECT OF THE SUBSTANTIVE COUNTS OF THE CONSPIRACY COUNT IS CLEAR. THE STRENGTH OF THE GOVERNMENT'S CONSPIRACY CASE RESTED ON THE TESTIMONY OF CO-CONSPIRATOR TURNED INFORMER, SCANLON. HIS TESTIMONY ESTABLISHED THE ILLEGAL CONSPIRACY AND PAINTED THE INNOCUOUS ACTIVITY, TESTIFIED TO BY OTHER GOVERNMENT WITNESSES, TELEPHONE CONVERSATIONS WITH APPELLANT, TRIPS TO APPELLANT'S APARTMENT, ETC., WITH THE COLOR OF COCAINE.

THE PRESENCE OF THE COCAINE, HEROIN, AND MARIJUANA IN APPELLANT'S APARTMENT, NO MATTER HOW MINUTE THE QUANTITY OR DISTANT IN TIME FROM THE CONSPIRACY TESTIFIED TO, COULD ONLY PERMIT THE UNWARRANTED INFERENCES BY THE JURY THAT THE DEFENDANT WAS OF A CRIMINAL CHARACTER OR DISPOSITION AND SO CORROBORATED SCANLON'S OTHERWISE UNCORROBORATED CONSPIRACY TESTIMONY WITHOUT SUBSTANTIAL PROBATIVE BENEFIT. U.S. V. DEATON, 381 F 2D 114, 117 (2D CIR. 1967); U.S. V. DICCICIO, 435 F 2D 478 (2D CIR. 1970); U.S. V. GLASSER, 443 F 2D 994 (2D CIR. 1971).

THE PREJUDICE OF COURSE, FLOWED BOTH WAYS. THE CONSPIRACY COUNT'S VOLUMINOUS TESTIMONY CONCERNING THE DISTRIBUTION OF DRUGS BY THE APPELLANT UP TO JUNE, 1973, COULD HAVE ONLY POURED OVER INTO THE JURY'S CONSIDERATION OF WHETHER THE APPELLANT'S POSSESSION OF DRUGS ON JANUARY 17, 1974, WAS WITH THE INTENT TO DISTRIBUTE.

ALTHOUGH THE SMALL QUANTITY OF DRUGS IN APPELLANT'S POSSESSION ON JANUARY 17, 1974, WAS CERTAINLY CONSISTENT WITH THE THEORY THAT THE DRUGS WERE FOR PERSONAL USE, THE VAST AMOUNT OF EVIDENCE OF DISTRIBUTION ADMITTED ON THE CONSPIRACY COUNT COULD NOT HAVE FAILED BUT TO HAVE ENTERED THE JURY ROOM DURING ITS DELIBERATION OF THE SUBSTANTIVE COUNTS. IN FACT, ALTHOUGH THE COURT INSTRUCTED THAT THE CONSPIRACY DID NOT EXIST IN JANUARY, 1974, THE MONTH OF THE SUBSTANTIVE OFFENSES, THE JURY WAS INSTRUCTED THAT IT COULD CONSIDER THE EVIDENCE INTRODUCED ON THE CONSPIRACY COUNT IN ITS CONSIDERATION OF THE SUBSTANTIVE OFFENSES AND SPECIFICALLY IN ITS CONSIDERATION OF WHETHER THERE WAS AN INTENT TO DISTRIBUTE THE CONTROLLED SUBSTANCES INVOLVED.

> IF YOU FIND THERE WAS A POSSESSION AND YOU FIND THAT IT WAS THE KIND OF SUBSTANCE CHARGED IN THE PARTICULAR COUNT, YOU WANT TO HAVE IN MIND QUANTITY OF THE SUBSTANCE AND THE QUALITY. SIMILARLY, YOU WILL WANT TO CONSIDER WHATEVER THE EVIDENCE SHOWS ABOUT THE PRIOR BEHAVIOR OF EITHER DEFENDANT WITH RESPECT TO THE SUBSTANCES IN QUESTION, OR COMPARABLE SUBSTANCES.
>
> IN SHORT, YOU WILL CONSIDER ALL THE SURROUNDING CIRCUMSTANCES IN MAKING YOUR DECISION WHETHER THE POSSESSION, IF YOU FIND POSSESSION, WAS WITH INTENT TO DISTRIBUTE.
>
> (1113, A-46) EMPHASIS ADDED

AGAIN, THIS CONSPIRACY EVIDENCE CONCERNED EVENTS WHICH OCCURRED EIGHT MONTHS PRIOR TO THE DISCOVERY OF THE COUNTS 2, 3, AND 4 EVIDENCE IN THE DEFENDANT'S POSSESSION AND CONCERNED QUANTITIES OF CONTRABAND FAR IN EXCESS TO THAT DISCOVERED.

IN QUANTITY AND TIME, THE CONSPIRACY EVIDENCE WAS FAR

REMOVED FROM THE SUBSTANTIVE COUNTS FOR ITS PROBATIVE VALUE TO OUTWEIGH ITS PREJUDICIAL EFFECT. U.S. V. GLASSER, SUPRA, U.S. V. DICCICIO, SUPRA. ALTHOUGH THE COURT INSTRUCTED THAT THE CONSPIRACY "CERTAINLY DID NOT ENDURE UNTIL MARCH OF 1974", (1098, A-31), IT NOT ONLY FAILED TO INSTRUCT THE JURY TO CONSIDER THE EVIDENCE ON EACH COUNT SEPARATELY AND DISTINCTLY, BUT RATHER INSTRUCTED THE JURY THAT THEY COULD CONSIDER THE CONSPIRACY EVIDENCE ON THE SUBSTANTIVE COUNTS (1113, A-46). THIS CASE IS THUS DISTINGUISHED FROM U.S. V. LOTSCH, 102 F 2D 35, 36 (2D CIR. 1939); DREW V. U.S., 331 F 2D 85, 92 (1964); AND U.S. V. ADAMS, 434 F 2D 756 (2D CIR. 1970) WHERE, EITHER BECAUSE OF EXPLICIT INSTRUCTION OR BECAUSE OF THE SIMPLICITY OF THE EVIDENCE THERE WAS NO REASON FOR BELIEVING THE JURY COULD NOT KEEP SEPARATE THE EVIDENCE RELAVENT TO EACH COUNT. HERE THE JURY WAS INSTRUCTED TO INTERRELATE THE EVIDENCE.

POINT II

APPELLANT'S PRE-TRIAL MOTIONS FOR SUPPRESSION OF ALL EVIDENCE SEIZED ON JANUARY 16, 1974 WAS IMPROPERLY DENIED

THE APPELLANT WAS ARRESTED BY AUTHORITY OF AN ARREST WARRANT ISSUED ON JANUARY 10, 1974, AND EXECUTED ON JANUARY 16, 1974 (M29, 30). THE ARREST WARRANT AGAINST THE MOAZEZIS WAS SUPPORTED BY A COMPLAINT SWORN TO BY AGENT FREDERICK LOUGH (A-92)

IN PERFORMING THE ARREST AT THE APPELLANT'S APARTMENT, THE AGENT MADE CERTAIN OBSERVATIONS AND SEIZURES OF EVIDENCE WHICH FORMED THE BASIS OF THE AFFIDAVIT UNDERLYING THE SEARCH WARRANT (A-96). PURSUANT TO THE SEARCH WARRANT, ADDITIONAL EVIDENCE WAS SEIZED ON THE SAME DAY (571-90).

PRIOR TO TRIAL ON MAY 31, 1974, THE APPELLANT MOVED FOR SUPPRESSION OF ALL EVIDENCE SEIZED ON JANUARY 16, 1974, ON THE GROUNDS THAT THE ARREST WAS NOT BASED ON PROBABLE CAUSE AND THUS ALL SEIZURES OF EVIDENCE MADE PURSUANT TO THE ILLEGAL ARREST AND PURSUANT TO THE SEARCH WARRANT ISSUED ON THE BASIS OF THE OBSERVATIONS AND SEIZURES MADE DURING THE ILLEGAL ARREST MUST BE SUPPRESSED AS THE FRUITS OF THE ILLEGAL ARREST, OR POISONOUS TREE. WONG SUN V. U.S., 371 U.S. 471; SILVERTHORNE LUMBER CO., INC. V. U.S., 251 U.S. 385; U.S. V. PAROUTIAN, 299 F 2D 486 (CA 2D, 1962). (A-89-91).

THE MOTION WAS DENIED IN AN OPINION FILED ON MAY 7, 1974. (A-109)

THE ARREST WARRANT IS INSUFFICIENT ON ITS FACE SINCE THERE IS NO STATEMENT THAT THE INFORMER IS RELIABLE AND, IN FACT, IT IS ADMITTED IN THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT THAT THE

INFORMER IS NOT OF PAST PROVEN RELIABILITY. AGUILAR V. TEXAS, 378 US 108. (SEE BILL OF PARTICULARS, QUESTION AND RESPONSE #1, A-99,A106 THE INFORMER IN THE SEARCH WARRANT AFFIDAVIT AND IN THE COMPLAINT ARE THE SAME MAN)(SEARCH WARRANT AFFIDAVIT, A-96, COMPLAINT, A-92).

THE STRICT REQUIREMENTS OF AGUILAR V. TEXAS, SUPRA, WERE RELAXED IN DRAPER V. U.S., 358 US 307, 79 S CT 329, 3 L ED 2D 327, U.S. V. MANNING, 448 F 2D 992 (2D CIR), AND MOST RECENTLY IN WHITELEY V. WARDEN OF WYOMING STATE PRISON, 401 US 560, 28 L ED 2D 306, 91 S CT 1031 (1971(, AND IN U.S. V. CANIESO, 470 F 2D 1224 (1972).

THE COURT IN CANIESO HELD THAT:

> "WHEN A TIP NOT MEETING THE AGUILAR TEST HAS GENERATED POLICE INVESTIGATION AND THIS HAS DEVELOPED SIGNIFICANT CORROBORATION OR OTHER 'PROBATIVE INDICATIONS OF CRIMINAL ACTIVITY ALONG THE LINES SUGGESTED BY THE INFORMANT.'... THE TIP, EVEN THOUGH NOT QUALIFYING UNDER AGUILAR, MAY BE USED TO GIVE SUCH ADDITIONAL COLOR AS IS NEEDED TO ELEVATE THE INFORMATION ACQUIRED BY POLICE OBSERVATION ABOVE THE FLOOR REQUIRED FOR PROBABLE CAUSE."
>
> U.S. V. CANIESO, SUPRA AT P. 1231

THE POLICE CORROBORATION STATED IN THE ARREST WARRANT FOLLOWS:

> 2. VERIFICATION OF INFORMATION RECEIVED FROM THE CO-CONSPIRATOR TENDING TO CORROBORATE THE ABOVE TESTIMONY. (AIRLINE TICKETS AND PASSPORT CORROBORATES DATES TESTIFIED TO)

THE AFFIDAVIT SUPPORTING THE SEARCH WARRANT GIVES A HINT AS TO THE CORROBORATION CONDUCTED:

> THE WITNESS IS NOT OF PAST PROVEN RELIABILITY HOWEVER MUCH OF THE INFORMATION HE HAS PROVIDED SUCH AS THE DATES OF PLANE TRIPS TO

SOUTH AMERICA, THE AIRLINE USED, THE ADDRESS OF THE DEFENDANTS AND A DESCRIPTION OF THEM HAS BEEN CORROBORATED BY YOUR DEPONENT.

(A-96)

THIS CORROBORATION CLEARLY DOES NOT MEET THE CANIESO OR WHITELY TESTS SINCE THE AIRLINE TICKETS AND PASSPORTS DID NOT CORROBORATE TRIPS TAKEN BY THE MOAZEZIS, BUT TRIPS TAKEN BY THE INFORMER. THE RECORD OF THE TRIAL CLEARLY SHOWS THAT IT WAS SCANLON WHO MADE TRIPS TO SOUTH AMERICA. THERE IS NO EVIDENCE THAT THE MOAZEZIS EVER LEFT NEW YORK DURING THE PERIODS STATED IN LOUGH'S AFFIDAVIT. THE GOVERNMENT, IN ITS REPLY AFFIDAVIT TO THE DEFENDANT'S MOTION TO SUPPRESS, STATES THAT THE MOAZEZIS WERE NOT THE CONSPIRATORS WHO FLEW TO SOUTH AMERICA (1-98, PARAGRAPH #4). SO, OFFICER LOUGH'S INDEPENDENT INVESTIGATION CORROBORATED SCANLON'S CRIMINAL ACTIVITY, NOT THE APPELLANT'S. "BUT THE ADDITIONAL INFORMATION ACQUIRED BY THE ARRESTING OFFICERS MUST IN SOME SENSE BE CORROBORATIVE OF THE INFORMER'S TIP THAT THE ARRESTEES COMMITTED THE FELONY OR AS IN THE DRAPER CASE ITSELF, WERE IN THE PROCESS OF COMMITTING THE FELONY." WHITELY, SUPRA, AT 567. AS IN WHITELY ITSELF, THE ONLY CORROBORATION HERE CONCERNING THE APPELLANT IS THAT SCANLON KNEW THEM, HE GAVE THEIR NAMES AND DESCRIPTION, THERE WAS NO CORROBORATION OF THE APPELLANT'S ALLEGED CRIMINAL CONDUCT.

IN ITS OPINION, THE COURT STATED THAT A CO-CONSPIRATOR'S SWORN TESTIMONY BEFORE A GRAND JURY WAS, WITHOUT MORE, SUFFICIENT TO CONSTITUTE PROBABLE CAUSE (A-109).

IT IS HERE ARGUED THAT THE FACTS AND CIRCUMSTANCES KNOWN

TO THE ARRESTING OFFICERS AT THE TIME OF THE ARREST WERE NOT SUFFICIENT TO WARRANT A PRUDENT MAN IN BELIEVING THAT THE DEFENDANTS HAD COMMITTED AN OFFENSE (CARROLL V. U.S., 267 US 132, 162; HENRY V. U.S., 361 US 98, 102; WONG SUN V. U.S., SUPRA).

THE GRAND JURY TESTIMONY REFERRED TO IN AGENT LOUGH"S COMPLAINT UNDERLYING THE ARREST WARRANT WAS GIVEN ON JANUARY 8, 1974. BUT THE GRAND JURY DID NOT THEN VOTE TO INDICT AND THAT GRAND JURY PROCEEDING TERMINATED ON THE SAME DAY, JANUARY 8, 1974. (SEE BILL OF PARTICULARS, 2, 3; A-99, 106).

THERE WAS NO INDICTMENT UNTIL JANUARY 25, 1974, AFTER THE DEFENDANTS' ARREST (BILL OF PARTICULARS QUESTION & RESPONSE 4) (A-99, 106). THUS WHEN AGENT LOUGH APPLIED FOR THE ARREST WARRANT, THE GRAND JURY HAD NOT VOTED OR PASSED ON SCANLON'S CREDIBILITY.

WHEN AGENT LOUGH APPLIED FOR THE COMPLAINT HERE IN ISSUE IN JANUARY, 1974, HE WAS AWARE OR AT LEAST SHOULD HAVE BEEN AWARE THAT SCANLON HAD MANY POWERFUL MOTIVES FOR LYING BEFORE THE GRAND JURY IN JANUARY, 1974.

AGENT LOUGH TOLD SCANLON IN JUNE, 1973, THAT HE WOULD NOT BE PROSECUTED FOR INFORMATION HE WOULD GIVE FOR CRIMES INCRIMINATING OTHERS (655-7).

SCANLON INCRIMINATED THE MOAZEZIS IN JUNE, 1973 (633-5). PRIOR TO MAKING THE INCRIMINATING STATEMENT, HE WAS PROMISED THAT HE WOULD NOT BE PROSECUTED FOR IMPORTING IN DECEMBER 1973 1 1/2 OUNCES OF COCAINE OR FOR IMPORTING IN DECEMBER 1972 600 GRAMS OF COCAINE (340-1). SCANLON TESTIFIED THAT THE SENTENCING JUDGE IN HIS FEDERAL CASE (THE SADOWSKI-SCANLON CASE) TOOK HIS

COOPERATION INTO CONSIDERATION WITH REGARDS TO SENTENCING (235-6). AGENT LOUGH WAS IN CHARGE OF THE SADOWSKI-SCANLON CASE. (693)

PRIOR TO TESTIFYING BEFORE THE FEDERAL GRAND JURY, SCANLON WAS INFORMED THAT HIS COOPERATION AGAINST THE MOAZEZIS WOULD HELP HIM IN HIS PENDING BRONX STATE NARCOTICS CASE, WHERE HE FACES LIFE IMPRISONMENT (371, 236). HE WAS AWARE THAT HIS ONLY HOPE TO AVOID THE LIFE SENTENCE WAS TO AID IN THE ARREST AND CONVICTION OF THE MOAZEZIS (237).

IN JUNE, 1973, EIGHT MONTHS BEFORE HE GAVE THE GRAND JURY TESTIMONY UPON WHICH THE ARREST WARRANT IS BASED, HE INCRIMINATED THE MOAZEZIS (633-5) AND AN OFFICIAL INVESTIGATION OF THE MOAZEZIS BEGAN (654-5). BUT ALTHOUGH AGENT LOUGH HAD THIS INFORMATION REGARDING THE MOAZEZIS IN JUNE, 1973, THERE WAS NO ARREST FOR SEVEN MONTHS. IN THE FOLLOWING MONTHS WHILE THE FEDERAL INVESTIGATION OF THE MOAZEZIS WENT ON, SCANLON HIMSELF, ATTEMPTED TO CORROBORATE HIS INCRIMINATING STATEMENTS; HE ATTEMPTED TO CONTACT THE APPELLANT. SHE WOULD NOT SPEAK TO HIM (985-8).

THE POLICE, IN THEIR ATTEMPT TO CORROBORATE SCANLON'S STORY, SURVEYED THE APPELLANT'S APARTMENT, THEY VERIFIED SCANLON'S TRIPS TO SOUTH AMERICA, SCANLON'S CRIMINAL ACTIVITY BUT COULD CORROBORATE NOTHING CONCERNING THE MOAZEZIS EXCEPT THEIR NAME AND ADDRESS (985-8) (SEE AFFIDAVIT FOR ARREST AND SEARCH WARRANT) (A-93, 96).

IF THE AGENTS FELT SCANLON'S INFORMATION WAS RELIABLE, WHY WAS THERE NO ARREST IN JUNE OR JULY, 1973. THEY HAD THE INCRIMINATING INFORMATION THEN? AND IF SCANLON WAS NOT RELIABLE THEN, DID HE BECOME MORE RELIABLE AFTER AN EIGHT MONTH INVESTIGATION

FAILED TO CORROBORATE ANY MORE OF HIS STORY THAN THE NAME AND ADDRESS OF THE APPELLANT?

APPARENTLY, HAVING GIVEN UP WITH CORROBORATING SCANLON'S TESTIMONY, AFTER AN EIGHT MONTH INVESTIGATION, THE GOVERNMENT SOUGHT TO CLOTHE HIS INFORMATION WITH LEGITIMACY: SCANLON WAS TAKEN BEFORE THE GRAND JURY ON JANUARY 8, 1974, BUT THERE WAS NO INDICTMENT.

SO THE COMPLAINT HERE IN ISSUE WAS DRAWN OUT USING SCANLON'S NOW SWORN GRAND JURY TESTIMONY AS ITS BASIS FOR PROBABLE CAUSE.

DID SCANLON'S UNRELIABLE INFORMATION IN JUNE, 1973 BECOME MORE RELIABLE IN JUNE, 1974 BECAUSE SCANLON SWORE THAT IT WAS? WOULD AN INDIVIDUAL WHO WOULD GIVE FALSE INFORMATION TO A FEDERAL AGENT THAT HE KNOWS WILL LEAD TO THE ARREST AND MAYBE CONVICTION OF THE INNOCENT HAVE ANY COMPUNCTION WHATSOEVER TO MAKE THAT LIE UNDER OATH?

THE POLICE HAD EIGHT MONTHS TO CORROBORATE THE INFORMATION INCRIMINATING THE MOAZEZIS, INFORMATION FROM AN INDIVIDUAL WHOM THEY KNEW HAD POWERFUL MOTIVES TO LIE AND WAS NOT OF PAST PROVEN RELIABILITY, BUT FAILED AT ANY CORROBORATION.

THE GRAND JURY ON JANUARY 8, 1974, DID NOT PASS ON SCANLON-S CREDIBILITY, IT DID NOT VOTE AN INDICTMENT, WHY SHOULD ITS SILENCE HAVE GIVEN SCANLON'S UNCORROBORATED INFORMATION THE CLOAK OF RELIABILITY?

CONCLUSION

THE JUDGMENT OF CONVICTION SHOULD BE REVERSED.

RESPECTFULLY SUBMITTED,

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